Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1994

ROY CHARLES MARTIN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT AT NEW ORLEANS

PETITION FOR WRIT OF CERTIORARI

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7 March 1995

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19 pp

QUESTION PRESENTED

WHETHER THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE JURY WAS INSTRUCTED THAT THE STATE OF TEXAS HAD MADE AN ASSESSMENT AGAINST HIM FOR UNPAID TAXES WHERE THE RECORD SHOWS THAT THE PETITIONER WAS NOT PROVIDED NOTICE OR A HEARING TO CHALLENGE SUCH ASSESSMENT THAT WAS A CRUCIAL ISSUE DURING THE TRIAL?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROY CHARLES MARTIN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT AT NEW ORLEANS

Petitioner, Roy Charles Martin, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit decided and filed on 9 December 1994, and which Petition for Rehearing was denied on 17 January 1995.

OPINION BELOW

The Fifth Circuit of Appeals affirmed the judgment of the District Court in *United States of America v. Roy Charles Martin*, on 9 December 1994, without the issuance of a written opinion pursuant to Fifth Circuit Local Rule 47.6. See Appendix A. The order of the Fifth Circuit Court of Appeals, dated 17 January 1995, denying the Petition for Rehearing is attached as Appendix B.

JURISDICTION

The opinion/order of the Fifth Circuit Court of Appeals (Appendix A) was decided and filed on 9 December 1994. The order of the Fifth Circuit Court of Appeals denying the Petition for Rehearing was filed on 17 January 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution, which is the source of the Due Process protection asserted in this case, is set forth as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

> case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Also, the Fourteenth Amendment, Section 1, of the United States Constitution provides, in part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law;...".

STATEMENT OF THE CASE

The Petitioner Martin was charged and convicted in 203 counts of an indictment alleging the offenses of conspiracy to defraud by means of mail and wire fraud, and money laundering. The trial court had jurisdiction pursuant to 18 U.S.C. § 3231.

The petitioner Martin was the owner of a Texas diesel fuel distribution company that purchased and sold diesel fuel. The Government's underlying theory was that Martin had acquired diesel fuel without the payment of Texas diesel fuel excise taxes. During the trial, a key issue was raised as to whether the State of Texas had made an assessment of taxes and liabilities against the Petitioner. After an extensive hearing, the trial court concluded that such an assessment had been made and the trial court so charged the jury. Such jury charge was devastating to the defense because Martin's defense was that he had paid the excise taxes and had no knowledge that earlier suppliers had not paid such taxes. Martin's due process rights were violated because the State of Texas neither gave him notice nor a hearing regarding the assessment. Moreover,

seven months after the trial Martin received a notice that excise taxes were due and he subsequently challenged the assessment. The jury instructions violated Martin's Due Process rights because the initial assessment had been made without notice or a hearing.

REASON AND ARGUMENT FOR GRANTING THE PETITION

WHETHER THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE JURY WAS INSTRUCTED THAT THE STATE OF TEXAS HAD MADE AN ASSESSMENT AGAINST HIM FOR UNPAID TAXES WHERE THE RECORD SHOWS THAT THE PETITIONER WAS NOT PROVIDED NOTICE OR A HEARING TO CHALLENGE SUCH ASSESSMENT THAT WAS A CRUCIAL ISSUE DURING THE TRIAL?

Federal and State investigators set up an undercover operation in order to locate and apprehend individuals who were distributing diesel fuel oil without payment of Texas excise taxes. The agents set up a shell company called Magnum Oil Company for the purpose of luring individuals into purchasing diesel fuel without the payment of State excise taxes. Magnum Oil purchased diesel fuel from a legitimate supplier and subsequently distributed the diesel oil to the co-defendant Beadles, who operated a company known as Profits Research. In turn, the Petitioner Martin acquired the diesel fuel from Profits Research.

The Government's theory was that Martin acquired the diesel fuel without the payment of Texas excise taxes.

Also, the Government argued that false invoices were used in an attempt to show that the excise taxes had been paid. However, the defense argued that Martin, in fact, had paid the excise taxes and had no knowledge that earlier suppliers had not paid those taxes. Furthermore, the defense argued that Magnum Oil, not the later purchasers of the diesel fuel, was liable for the excise taxes.

During the trial, a key issue was raised as to whether the State of Texas had made an assessment of taxes and liabilities against Martin. During the early stage of the trial, Dicky Haas, a tax auditor with the Texas State Comptroller's Office, testified that he was unaware of any assessment having been made against Martin. Near the end of the trial, the prosecutor advised the Court that on the previous evening he had received information that an assessment had been made against Martin and Son, Inc. The prosecutor further advised the Court that testimony would establish that the auditor had determined that a tax liability existed and that an assessment had been made. As the prosecutor stated: "Our position is, and I believe the testimony will show, that the auditor's determination of a total tax adjustment is, in fact, the assessment." The defense objected as follows: "It is a determination . . . of guilt that was made outside the presence of these defendants without them having any due process in order to respond to that."

A hearing was then conducted outside the presence of the jury at which time Gary Moerbe, an audit manager for the Texas State Comptroller's Officer, testified. During the hearing, the auditor identified a processing form (DL-263) that had been placed on the front of the Martin

and Son, Inc. audit file. According to the auditor, such document provided information concerning the case. The auditor stated that this cover sheet resulted in an assessment by the Comptroller's Office but that additional due process review proceedings could occur. The auditor also stated that the document DL-263 stated: "Do not release billing". On cross-examination the auditor said that such document had never been released and the the document was merely a " . . . processing record showing what the assessment on this taxpayer is". The auditor further stated that the notification of tax liability was based on such document. However, in this case, the Petitioner had never been notified of any liability. The auditor also admitted that, once the notification had been received by the taxpayer, the taxpayer had the right to request a redetermination within thirty days after notification. The auditor said that the amount due had been determined by the comptroller although no notice had been provided to the taxpayer.

The auditor further acknowledged that he had talked with the attorney for the Petitioner on 4 November 1992 and advised the attorney that an "internal assessment" had been made on 8 June 1992. He further said that he told the attorney that an assessment would be made in the future. Also, he did not tell the attorney in November of 1992 that an assessment had been issued. Also, he admitted that only the State Comptroller had the authority to make a formal action of assessment. He also stated that the assessment against Martin and Sons was $2,655,263 for the period between June of 1991 and December of 1991.

Additional objections were voiced by the defense in-

cluding the fact that the Petitioner had been denied his Due Process rights in challenging the alleged tax liability. Objections were also voiced that no final determination had been made. The defense also objected that the instruction on the assessment amounted to a comment on the evidence. The trial court advised the attorneys that the charge would read: "You are further instructed that the Comptroller of the State of Texas has assessed the defendants Roy Charles Martin and Joe Haven Beadles". Finally, the defense objected to the language regarding the assessment because: " . . . under Texas law there clearly has been no final determination or assessment." Such objection was overruled. The trial court also stated that the fact that an assessment had been made should be considered by the jury. The trial court then instructed the jurors as follows:

"You are further instructed that the Comptroller of the State of Texas assessed defendant Roy Charles Martin for unpaid diesel fuel excise taxes on 10 July 1992, for the audit period June 1988 to January 1992 . . . "(R.I-19).

Subsequent to the trial, Martin received a "Texas Notice of Tax Due" dated 2 September 1993 stating that an audit had been performed for the time period 1 June 1988 to 31 January 1992 and that the Comptroller had determined that the amount due was:

" Tax Due	$	2,655,262.80
Penalty	$	3,153,033.70
Interest	$	929,221.00."

Such Notice of Tax Due further advised the Petitioner that he had the right to rquest a hearing on or before 22

September 1993 in the event that he disagreed with the assessment. In this case, such a request was made. The issuance of the formal tax notice on 2 September 1993 established the fact that no actual assessment had been made against Martin until that date.

During the trial, Martin had vigorously argued that no assessment had been made by the State of Texas and, even if one had been made, he had been denied his Due Process right to challenge such assessment, if any. However, as stated above, the trial court instructed the jurors as follows:

> "You are further instructed that the Comptroller of the State of Texas assessed defendant Roy Charles Martin for unpaid diesel fuel excise taxes on 10 July 1992, for the audit period June 1988 to January 1992 ...". (R.I-19)

Such jury instruction was devasting to the defense. Martin's defense was that he had paid the excise taxes and had no knowledge that earlier suppliers had not been paid those excise taxes. The foregoing jury instruction totally undercut that defense and amounted to a comment by the trial court on Martin's guilt.

Even if such assessment had been made, such assessment was clearly invalid because it constituted a blatant violation of Martin's Due process right to be provided notice of such intended assessment and the opportunity to challenge such assessment. The alleged assessment in this case was made by the Texas State Comptroller's Office without notice to Martin. Moreover, Martin did not receive

the "Texas Notice of Tax Due" until approximately seven (7) months *after* the trial. The Due Process Clause of the Fifth Amendment guarantees that no person shall be deprived of property without Due Process of law. Furthermore, the general rule is that an individual must receive notice and an opportunity to be heard before the Government can deprive that individual of property. *United States v. James Daniel Good Real Property*, ____ U.S. ____, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). See also, *Logan v. Zimmermann Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1981). Due process requires, at a minimum, notice of reasons for the proposed deprivation and some opportunity to respond to the substance of the allegations before a final deprivation occurs. *Williams v. Texas Tech Univ. Health Sciences Ctr.*, 6 F.3d 290 (5th Cir. 1993). Also, in *Matter of Christopher*, 28 F.3d 512 (5th Cir. 1994), the Court noted that due process requires both adequate notice to apprise a party of the pendency of an action affecting his rights and timely enough to allow the party to present his objections.

Martin is not challenging the Texas regulatory procedure that provides for notice and an opportunity to challenge the assessment. The Texas regulatory scheme in place does not constitute a violation of procedural due process. However, the trial court in this case ignored the fact that the assessment by the Texas State Comptroller's Office had been made without notice and an opportunity to be heard. Furthermore, even if an assessment had been made, such assessment was not final and cannot withstand a Due Process attack.

Finally, highly prejudicial damage was caused by

the jury instruction that advised the jurors that an assessment had been made against Martin. Again, the critical issue before the jury was whether or not Martin had paid the excise taxes and the jury instruction removed that defensive issue. Reversible error was committed when a jury instruction invades the province of the jury by taking from it a fact-intensive issue that is before the jury. See generally, *United States v. Smithers*, 27 F.3d 142 (5th Cir. 1994).

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John H. Hagler

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ROY CHARLES MARTIN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

93-4911

FILED
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UNITED STATES OF AMERICA,

Plaintiff-Appellees,

versus

ROY CHARLES MARTIN and
JOE HAVEN BEADLES,

Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas
(6:92-CR-49 (1))

Before JONES, DeMOSS, Circuit Judges, and BUNTON*,
District Judge.

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* Hon. Lucius D. Bunton, U. S. District Judge from the Western District of Texas, sitting by designation.

PER CURIAM:**

The judgment of the district court is AFFIRMED. *See* Loc. R. 47.6.

ISSUED AS MANDATE:

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4911

FILED
JAN 17 1995

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY CHARLES MARTIN and
JOE HAVEN BEADLES,

Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas
(6:92-CR-49 (1))

ON PETITION FOR REHEARING

(January 17, 1995)

Before Jones, DeMoss, Circuit Judges, and Lucius D. Bunton, District Judge.[1]

[1] Judge Lucius D. Bunton, U. S. District Judge from the Eastern District of Texas, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing as to Roy Charles Martin filed in the above case is DENIED.

ENTERED FOR THE COURT:

/S/ HAROLD R. DEMOSS, JR.,
United States Circuit Judge